MBF COUNTRY HOMES & RESORTS SDN BHD

v.

SUPPIAH MANICKAM & ORS

HIGH COURT MALAYA, ALOR SETAR
VINCENT NG J
[LABOUR APPEAL NO: 16-6-98]
29 OCTOBER 2002

LABOUR LAW: *Employment - Termination benefits - Whether employees' services terminated prior to mandatory retirement age - Whether employees entitled to termination benefits - Whether Labour Court had erred in law and fact*

This was an appeal by the appellants against the decision of the Labour Court directing the appellants to pay all the four respondents termination benefits in varying amounts totaling RM129,971.98. The four respondents were employed with the company until they each received a letter informing them of the company's intention to discontinue their employment as they had attained the age of retirement, and thus, pursuant to art. 44 of the MAPA/AMESU collective agreement 1995 ('the collective agreement'), the company was giving them the required eight weeks notice. The respondents claimed that they were entitled to termination lay-off benefits as their services were being terminated prior to the mandatory retirement age of 60 years while the appellants refuted the claims on the ground that the mandatory retirement age was 55 years and not 60 years.

Held:

[1] In the instant case, it was incontrovertible and beyond question that the respondents agreed to be subjected to art. 44(a) of the collective agreement which clearly stated that "the age of retirement of employees shall be 55 years." The proviso in art. 44 that "employment may be continued thereafter by mutual agreement between the employer and the employee concerned up to the age of 60 years …" was merely intended to preserve the parties' plenary contractual right to continue the employment contract by mutual agreement after the employee reached 55 years of age. In this case, on the evidence adduced, the proviso in art. 44(a) was not triggered into operation, as clearly, no fresh employment agreement, in writing or orally, had been entered into between the appellants and any of the respondents to re-cap the retirement age at 60 years. It could not in law or logic be

concluded or presumed, bereft of any evidence, that the appellants had agreed to re-cap the retirement age at 60 years on the sole basis that the appellants had allowed the respondents to continue in employment after they had turned 55 years of age. Therefore, the Labour Court had clearly erred in law and in fact in ordering the appellants to pay termination benefits to the respondents under the provision of reg. 6 of the Employment (Termination and Lay-Off Benefits) Regulations 1980. (pp 466 c & 467 a)

[Appeal allowed; award of the Labour Court set aside.]

Case(s) referred to:

Dr Satwant Singh Gill v. Hospital Assunta [1998] 4 CLJ 47 HC ***(refd)***

Malakoff Berhad Kuala Muda Estate Sungai Petani Kedah, v. Kuppusamy Senggaram & Ors [1990] 2 ILR 311 ***(refd)***

Sports Toto Malaysia Sdn Bhd v. Chong Keat Chin [1995] 1 ILR 742 ***(refd)***

Sykt Pemandangan Sinar Sdn Bhd & Anor v. Kesatuan Kebangsaan Wartawan Malaysia & Anor [1998] 2 CLJ 127 CA ***(not foll)***

Legislation referred to:

Employment (Termination and Lay-Off Benefits) Regulations 1980, regs. 4(1), 6
Evidence Act 1950, s. 114(g)
Industrial Relations Act 1967, s. 17(1)

For appellants - KC Wong; M/s Zul Rafique & Partners
For respondents - P Jayasingam; M/s P Kuppusamy & Co

[The respondents have appealed to the Court of Appeal vide Civil Appeal No: K-08-343-2000]

Reported by Suresh Nathan

JUDGMENT

Vincent Ng J:

This appeal originated from the Labour Court at Kulim. After hearing the parties, the officer concerned directed that the appellants do pay all the four respondents termination lay-off benefits in varying amounts totaling RM129.971.98. The appellants being dissatisfied with the said decision of 25 November 1998 appealed to this court.

All the four respondents testified at the court of original instance and closed their case after calling another witness, details of whom I shall deal with later. Gleaning from the evidence of the witnesses called by both parties, I gather that all the four respondents had worked at an estate identified as Padang Meiha

Plantation which was originally owned by The East Asiatic Company (Malaysia) Berhad ('EAC'). The section of the plantation which the four respondents were employed was sold to GloCard (Malaysia) Sdn. Bhd., a wholly owned subsidiary of MBf Holdings Berhad ('GloCard'). Pursuant to this change in ownership, EAC issued a standard letter dated 9 March 1995 informing the affected workers of the ownership change and assured them that the new owners would be offering them continued employment on terms and conditions which were no less favorable than those which the workers were then enjoying under EAC.

This assurance proved true when GloCard in its capacity as the new owner issued a standard letter of offer, received by all the four respondents, which appears as follows:

THE MBf GROUP OF COMPANIES

9th March 1995

MR. SUPPIAH @ MARIAPPAN S/O M'KAM

NRIC No. 2401888

Dear Sir/ madam,

RE: LETTER OF OFFER PURSUANT TO THE EMPLOYMENT (TERMINATION AND LAYOFF BENEFITS) REGULATIONS 1980.

With reference to the above matter, we are pleased to inform you that we, GloCard (Malaysia) Sdn. Bhd. (a wholly owned subsidiary of MBf Holdings Berhad), are the new owners of the business concerning Padang Meiha Plantation insofar as the area covered by your scope of employment is concerned.

We, hereby offer you continued employment under terms and conditions of employment not less favorable than those under which you were employed before the change of ownership.

Please be informed that this letter is sufficient to constitute an offer for the purposes of Regulations 8 of the Employment (Termination and Layoff Benefits) Regulations 1980.

Should you decide to accept this offer, please signify your acceptance of continued employment in the duplicate copy of this letter, attached herewith, which should reach the undersigned on or before 20 March 1995.

Yours faithfully,

For GloCard (Malaysia) Sdn. Bhd.

Sgd.
DEENA ABRAHAM
Assistant Vice President
MBf Group Human Resources Division.

The four respondents accepted the offer to continue employment with GloCard and life went on as usual until 1996 when they each received a letter dated 27 February 1996 informing them of the company's intention to discontinue their employment. In this letter, the management explained that the records showed that all the four respondents had attained the age of retirement on dates ranging from 1991 to 1994 and, thus, pursuant to 'art. 44' of the MAPA/AMESU Collective Agreement 1995 (CA) the company was giving them the required eight weeks notice. Article 44 of the MAPA/AMESU reads as follows:

(a) The age of retirement of employees shall be 55 years provided that employment may be continued thereafter by mutual agreement between the employer and the employee concerned up to the age of 60 years and he shall continue to receive the same terms and conditions of service as provided for in this agreement.

(b) Should no birth certificate be available, the date of birth in the employee's identity card will be taken to be the date of birth to determine the retirement age.

(c) An employee may opt to retire at any time after attaining the age of 50 years with prior approval of the employer.

A dispute then arose between the two parties; the respondents claimed that they were entitled to termination lay-off benefits as their services were being terminated prior to the mandatory retirement age of 60 years while the management (appellants) refuted the claims on the grounds that the mandatory retirement age was at 55 years and, not as contended by the respondents at 60 years.

From the testimonies of all of the four respondents, it is obvious that their belief that their retirement age had been extended from 55 years to 60 years is based largely on an alleged oral communication to them by a manager identified as one Encik Wan Wai Mun. This Encik Wan was, however, not called as a witness – which raises the presumption under s. 114(g) of the Evidence Act 1950 – and none of the respondents were able to state whether at the point of time of the said communication, the said Encik Wan was under the employment of EAC or the appellants although it was clear that he was

working at the estate before and after GloCard took over. Indeed, the testimonies of the respondents themselves do not support their suggestions that the estate Manager had increased their retirement age from 55 to 60 years. In his cross-examination, the first respondent, namely, Suppiah @ Mariappan a/l Manickam contradicted his testimony that the estate manager had informed him that his retirement age had been changed from 55 years to 60 years. At p. 25 of the Appeal Record, (6th line from the top) he testified that: "Saya tiada sebarang dokumen menyokong perkhidmatan saya bersambung sampai umur 60 tahun. Saya setuju saya hanya diberitahu untuk sambung kerja selepas umur 55 tahun tetapi tidak sampai umur 60 tahun." Krishnamoorthy a/l Savariraju, the second respondent, also gave the following contradictory testimony in cross-examination (at p. 28 of the Appeal Record, 9th line from the top): "Saya setuju Encik Wan Wai Mun ada beritahu bila capai umur 55 tahun, saya boleh dilanjutkan perkhidmatan sehingga 60 tahun berdasarkan art. 44(a). Saya setuju Encik Wan Wai Mun tidak pernah beritahu saya pada mana-mana masa bahawa umur persaraan saya telah bertukar dari 55 tahun kepada 60 tahun. Mengikut art. 44(a), umur persaraan adalah 55 tahun."

Similarly, also in cross-examination, the third respondent, Subramaniam a/l Munian admitted adversely to his case (at p. 31 of the Appeal Record) that: "Semasa saya capai umur 55 tahun, Encik Wan Wai Mun tidak ada beritahu saya bahawa umur persaraan telah bertukar dari 55 kepada 60 tahun." This was further confirmed by the fourth respondent, Yong Sin Yoong (at p. 33 of the Appeal Record), when he was cross-examined, that: "Encik Wan Wai Mun katakannya pada saya bahawa saya boleh terus bekerja setelah saya capai umur 55 tahun tetapi tidak beritahu sehingga umur berapa. Saya setuju apa yang diberitahu oleh Encik Wan Wai Mun adalah berdasarkan art. 44, Perjanjian MAPA/AMESU." There was no suggestion whatsoever that the estate Manager had told him that his retirement age was to be augmented from 55 to 60. What was clearly told to him was that he may continue working after his retirement age in accordance with art. 44 of the MAPA/AMESU Collective Agreement.

In the light of all the above, quite clearly, the only dispute before the Labour Court was the interpretation of art. 44(a) of the said MAPA/AMESU Agreement, since the question that the collective agreement was not applicable to the appellant and the respondents after the appellant took over the estate was never an issue. Indeed, this was confirmed by the respondents' own witness, one Thamotharem a/l DP Sundram, who identified himself as the secretary general of AMESU; and who also confirmed that as the four respondents were members of AMESU they were bound by MAPA/AMESU Agreement.

The appellants called two witnesses, that is, its human resources manager and the Industrial Relations Advisor of Malayan Agricultural Producers Association (MAPA). I do not propose to deal with their evidence at length save that the crux of their evidence is that both parties are bound by the MAPA/AMESU agreements. In addition to this, the evidence of the human resources manager, one Encik P Velaiuthan Kumaran a/l P Velaiuthan, revealed that the letters of offer (as reproduced earlier in the judgment) had been given to the respondents after the respondents had been in the appellants' employment for a year. He admitted that at the point in time when the said offers were made the company had overlooked the fact that the respondents were above the mandatory retirement age of 55 years. He, however, denied that there was any agreed extension, oral or written, of the retirement age as alleged by the respondents. Neither was he informed of such agreement (on the extension), if any, by EAC.

After considering the evidence available and hearing the submissions of the parties, I allowed the appeal and set aside the order of the Labour Court for the following reasons.

No explanation was given for the absence of Encik Wan. Save for the bare assertion of the respondents, there is nothing to show that Encik Wan had actually communicated to them, with or without authority, any message that the retirement age had been raised to 60 years. I also note from the notes of evidence that, save for the first respondent, the remaining respondents admitted in cross examination that the said Encik Wan merely told them that they could continue to work after they had attained 55 years of age and not that the retirement age had been so raised. In the light of the conspicuous and unexplained absence of this Encik Wan and the uncertainty shrouding the communication he made, I find that there is no basis for believing that there was an expressed enlargement of the retirement age to 60 years by either the past or present management. I now turn to the law and documents relating to the respondents' employment.

The operative words in reg. 4(1) of the Employment (Termination and Lay-Off Benefits) Regulations 1980 are: "shall be entitled to termination benefits payment otherwise than ... (a) ... if the contract of service contains a stipulation in that behalf." Thus the issue for determination in the case at hand is: whether there is any stipulation to the contrary in the contract of service of the four respondents. It is trite that all employees are employed (initially) or continue to be employed under oral or written (in the form of individual or collective) contracts of service.

What is crystal clear is that after the change of ownership from East Asiatic Company (M) Bhd. (a member of the Malayan Agricultural Producers Association (MAPA)) to MBf Country Homes & Resorts Sdn Bhd., the respondents had by their conduct as well as from their own testimonies, accepted the terms offered by the appellants for their continued employment as contained in the appointment letter dated 9 March 1995. This appointment letter stipulated that the offer was for 'continued employment on terms and conditions no less favourable than those currently enjoyed by yourself under which you **are employed before the change of ownership**' (emphasis added) ie, the terms and conditions you are now currently enjoying under East Asiatic Company (M) Bhd. Notably, the termination of the respondents' services occurred only about a year later *vide* the appellant's letter to them dated 27 February 1996. It was not disputed that MAPA and AMESU were at the material times, parties to a collective agreement and that the respondents, as members of AMESU, were then entitled to enjoy the benefits of that agreement as employees of East Asiatic Company (M) Bhd.

It was not seriously contended by any of the four respondents in their evidence preferred in the Labour Court – and neither was there any cogent evidence – that the appellants had volunteered, in favour of the respondents, a fresh term (adverse to the appellant) pertaining to retirement age, either orally or in writing, at any time after the offer letter of 9 March 1995. Indeed, the piece of oral evidence common to all the four respondents, is that their continued employment with the appellant was subject to art. 44 of the collective agreement; which they had obviously adopted. It could be gathered from the tenor of the testimonies of all the four respondents that they may have laboured under the unfounded impression that, as the East Asiatic Company (M) Bhd had continued to employ them after they had passed their retirement age of 55 years, an implied novation occurred in the contract, and *ipso facto* their new retirement age was to be enhanced to age 60. If this is contended, it is untenable since the 3rd respondent had passed 60 years of age when the termination letter dated 27 February 1996 was served on him.

Thus, the only and real issue for decision would turn on the question whether the second limb (proviso) of art. 44(a) of the MAPA/AMESU Collective Agreement was invoked.

The case *Sykt Pemandangan Sinar Sdn Bhd & Anor v. Kesatuan Kebangsaan Wartawan Malaysia & Anor* [1998] 2 CLJ 127, which dealt with the interpretation of s. 17(1) of the Industrial Relations Act 1967 and not the Employment Act and Regulations, is of no assistance to the respondents' case, which is governed by the latter Act and Regulations. Furthermore, in the current

case the respondents had in fact agreed to the terms as expressed in art. 44 of the CA or to terms similar thereto for the purposes of their continued employment with the appellants, which places a 55 years cap on the retirement age save that it may be increased to 60 by express mutual agreement.

The cases *Malakoff Berhad Kuala Muda Estate Sungai Petani Kedah, v. Kuppusamy Senggaram & Ors v.* [1990] 2 ILR 311 and *Sports Toto Malaysia Sdn Bhd v. Chong Keat Chin* [1995] 1 ILR 742 do not at all support the respondents' contention, as both the collective agreement in Kuppusamy and the letter of appointment in Chong Keat Chin bore no provision concerning the age of retirement – the employment agreement in both cases were silent on the age of retirement. See also *Dr Satwant Singh Gill v. Hospital Assunta* [1998] 4 CLJ 47. Whereas, in the instant case what is incontrovertible and beyond question is that (as could be gleaned from their own evidence) the respondents have agreed to be subjected to art. 44(a) of the collective agreement which clearly states: 'the age of retirement of employees shall be 55 years.' The proviso in art. 44(a) that: 'employment may be continued thereafter by mutual agreement between the employer and the employee concerned up to the age of 60 years ...' is merely intended to preserve the parties plenary contractual right to continue the employment contract by mutual agreement after the employee has reached 55 years of age. In my judgment this article has been so specifically couched in order to enable the employer and employee to enter into a fresh employment contract for any period of service, such that the period so agreed upon does not extend beyond the employee attaining 60 years of age. And, should the parties fail to enter into such fresh employment contracts, the employee is deemed to have continued employment on a month to month basis. This must be so, otherwise an employee who continues in employment after he or she has attained 60 years of age (as happened in the case of the third respondent) would *ipso facto* contend that the retirement age set in art. 44(a) of the CA has been uncapped and he or she need not retire at all. Most importantly in the instant case, it has to be concluded, and I would hold, on the evidence adduced, that the proviso (second limb) in art. 44(a) was not triggered into operation, as clearly, no fresh employment agreement, in writing or orally, has been entered into between the appellant and any of the respondents to re-cap the retirement age at 60. It cannot in law or logic be concluded or presumed, bereft of any evidential basis, that the appellants had agreed to re-cap the retirement age at 60 on the sole basis that the appellants had in fact allowed the respondents to continue in employment after they had turned 55 years of age.

In the event, I would hold that the labour officer clearly erred in law and in fact in ordering the applicant to pay termination benefits to the respondents under the provision of reg. 6 of the Employment (Termination and Lay-Off Benefits) Regulations 1980. Hence the appeal is allowed and the award in the aggregate sum of RM129,971.98 is set aside.